Supreme Court, U.S.
FILED

941171 DEC 15 1994

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NO. 94

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CONNIE RESHARD,
PETITIONER,

VERSUS

FEDERICO PEÑA, SECRETARY
U. S. DEPARTMENT OF TRANSPORTATION
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an order denying the disqualification of an United States District Court judge for personal prejudice and bias under 28 U.S.C. § 144 and for the appearance of impartiality under 28 U.S.C. § 455(a) et seq. by his failure to maintain the integrity of the record and by his failure to comply with 28 U.S.C. § 753, is immediately appealable under 28 U.S.C. §§ 1291 and 1292 and the collateral order. Whether the application of § 144 automatically requires the concurrent application of section 455(a) to the question presented by the court of appeals.

II. Whether the District of Columbia Circuit abused its discretion when it did not issue a writ of mandamus to Chief Judge John Garrett Penn, directing him to reassign this case, and other directives consistent with federal law that requires the official record of judicial proceedings in federal courts to conform to the truth.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT OF CERTIORARI	12
APPENDIX	
Index	App. at 1

TABLE OF AUTHORITIES

PAGE

SUPREME COURT CASES

Antoine v. Byers & Anderson, Inc.,
502 U.S. __, 113 S.Ct. 2167 (1993) 30

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379, 74 S.Ct. 145,
98 L.Ed 106 (1953) 29

Berger v. United States,
255 U.S. 22, 41 S.Ct. 230, 65
L.Ed 481 (1921) 29

Cohen v. Beneficial Industrial
Loan Corp.,
337 U.S. 541, 69 S,Ct.
1221, 93 L.Ed 1528 (1949) 17

Cook v. United States,
267 U.S. 517, 45 S.Ct. 390,
69 L.Ed 767 (1955) 39

Coopers & Lybrand v. Livesay,
437 U.S. 463, 98 S.Ct. 2454,
57 L.Ed.2d. 351 (1978) 17

PAGE

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469, 95 S.Ct. 1029,
43 L.Ed.2d 328 (1975) 20

Ft. Wayne Books, Inc. v. Indiana,
109 S. Ct. 916 (1989) 20

In re Murchison,
349 U.S. 133, 75 S.Ct. 623,
99 L.Ed. 767 (1955) 21, 39

Kerr v. United States District
Court of California,
426 U.S. 394, 96 S.Ct. 2119,
48 L.Ed.2d 725 (1976) 28

LaBuy v. Howes Leather Co.,
352 U.S. 249, 77 S.Ct. 309,
1 L.Ed.2d 290 (1957) 27

Liteky, et al. v. United States,
___ U.S. ___, 114 S.Ct.
1147 (1994) 36

Mallard v. United States District
Court for Southern District of Iowa,
490 U.S. 296, 109 S.Ct. 1814,
104 L.Ed.2d 318 (1989) 31

McClellan v. Carland,
217 U.S. 268, 30 S.Ct. 501,
54 L.Ed. 762 (1910) 27

PAGE

Offutt v. United States,
348 U.S. 11, 75 S.Ct. 11,
99 L.Ed 11(1954) 22, 39

Puerto Rico Aqueduct and Sewer
Authority v. Metcalf & Eddy, Inc.,
__ U.S. __, 113 S.Ct. 684,
121 L.Ed.2d 605, on remand,
991 F.2d 935 (1st Cir. 1993) 19, 21

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424, 105 S. Ct. 2757,
86 L.Ed.2d 340 (1985) 23

Roche v. Evaporated Milk Ass'n.,
319 U.S. 21, 63 S.Ct.
938, 87 L.Ed 1185 (1943) 28

Schlagenhauf v. Holder,
379 U.S. 104, 85 S.Ct. 234,
13 L.Ed.2d 152 (1964) 27

Tummey v. State of Ohio,
273 U.S. 510, 47 S.Ct. 437,
71 L.Ed. 749 (1927) 22

Will v. United States,
389 U.S. 90, 88 S.Ct. 269,
19 L.Ed.2d 305 (1967) 28

PAGE

FEDERAL CASES

Bell v. Chandler,
569 F.2d 556 (10th Cir. 1978) 15

Borjay v. United States
District Court for the Northern
Mariana Islands,
919 F.2d 100 (9th Cir. 1990) 41

Bradley v. School Board of City
of Richmond, Virginia,
324 F.Supp. 439 (D.C.VA 1971) 37

Chase Manhattan Bank, A.A. v. Turner
& Newall, PLC,
964 F.2d 159 (2d Cir. 1992) 40

City of Pittsburgh v. Simmons,
729 F.2d 953 (3d Cir. 1984) 17

Davis v. Board of School
Comm'ns of Mobile County,
517 F.2d 1044, (5th Cir.
1975) cert. denied, 425 U.S. 944,
96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) 37

Delgrosso v. Spang and Co.,
903 F.2d 234 (3d Cir. 1990) 40

Hampton v. City of Chicago
643 F.2d 478 (7th Cir. 1981) 13

PAGE

In re Briscoe,
976 F.2d 1425 (D.C.Cir. 1992) 40

In re Corrugated Container Antitrust Litigation,
614 F.2d 958 (5th Cir.), cert. denied,
449 U.S. 888 (1980) 17

In re Dresser Indus., Inc.,
972 F.2d 540 (5th Cir 1992) 40

In re Federal Skywalk Cases,
680 F.2d 1175 (8th Cir. 1982) 13

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir 1990) 40

In re Grand Jury Investigation,
486 F.2d 1013 (3d Cir. 1976) 14

In re Hooker Insurance, Inc.,
937 F.2d 1350 (3d Cir 1993) 40

In re International Business
Machines Corp.,
618 F.2d 923 (2d Cir. 1980) 15

In re King World Productions, Inc.,
898 F.2d 56 (6th Cir. 1990) 41

In re N/O, Inc.,
5 F.3d 154 (6th Cir. 1993) 14

In re New Mwxico Gas Antitrust Litigation,
620 F.2d 794 (1980) 13

PAGE

In re Pruitt,
910 F.2d 1160 (3d Cir. 1990) 40

In re School Asbestos Litigation,
977 F.2d 764 (3d Cir. 1992) 14, 40

In re Sharon Steel Corp.,
918 F.2d 434 (3d Cir. 1990) 40

In re Smith,
926 F.2d 1027 (11th Cir. 1991) 41

In re United States,
666 F.2d 690 (1st Cir. 1981) 15

In re Virginia Elec. & Power Co.,
539 F.2d 357 (4th Cir. 1976) 13, 15

Kelley v. Metropolitan County Bd.
of Ed. of Nashville,
479 F.2d 810 (6th Cir. 1973) 13

Lac Du Flambeau Band of Lake
Superior Chippewa Indians v.
Stop Treaty Abuse-Wisconsin, Inc.,
991 F.2d 1249 (7th Cir. 1993) 15

Mafnas v. United States District
Court for the Northern Mariana Islands,
919 F.2d 101 (9th Cir. 1990) 41

McNeil v. Guthrie,
945 F.2d 1163 (10th Cir. 1991) 41

PAGE

Minnesota & Ontario Paper Co. v. Molyneaux,
70 F.2d 545 (8th Cir. 1934) 15

Pepsico, Inc. v. McMillen,
764 F.2d 458 (7th Cir, 1985) 15

Roberts v. Bailar,
625 F.2d 125, 128
(6th Cir. 1980) 24

Union Carbide Corp. v. United States Cutting Service, Inc.,
782 F.2d 710 (7th Cir. 1992) 14

United States v. Halderman,
559 F.2d 31 (D.C. Cir. 1976) 35, 36

United States v. Masters,
924 F.2d 1362 (7th Cir. 1991),
cert. denied, __ U.S. __, 111 S.Ct.
2019, 114 L.Ed.2d 105 (1992) 15

United States v. Sears, Roebuck & Co.,
785 F.2d 777 (9th Cir. 1986) 15

United States v. Gregory,
656 F.2d 113(2d Cir. 1981) 15

Wolfson v. Palmieri,
396 F.2d 121 (2d Cir. 1968) 36

Valenzuela-Gonzalez v. United States District Court for the District of Arizona,
915 F.2d 1276 (9th Cir. 1990) 41

	PAGE
Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993)	14
CONSTITUTION	
First Amendment	3, 21, 22
Fifth Amendment	3, 26
Eleventh Amendment	21,22
Fourteenth Amendment	Passim
FEDERAL STATUTES	
28 u.s.c. § 144	Passim
28 U.S.C. §455 (a)	Passim
28 U.S.C. § 476	7
28 U.S.C. § 753(b) and (c)	Passim
28 U.S.C. § 1291	Passim
28 U.S.C. § 1292(b)	13, 16
28 U.S.C. § 1651 (a)	26, 27, 29
28 U.S.C. § 1915(d)	32
28 U.S.C. § 2106	26

PAGE

42 U.S.C. §2000(e) et seq. 4

FEDERAL RULES

Federal Rules of Appellate Procedure

Rule 10 1, 7

Federal Rules of Civil Procedure

Rule 6(b)(2) 11

Rule 27 (b) 8

PERIODICALS

9 Moore's Federal Practice ¶ 110.26 27

Moore, Appellate Review,
35 Hastings L.J. 829 (1984) 15, 16, 18

Note. Judicial Disqualification
in the Federal Courts:
A Proposal to Conform Statutory Provisions
to Underlying Policies, 67 Iowa L.Rev. 525,
540-54 (1982). 16

Wright, Miller & Cooper,
Federal Practice and
Procedure Jurisdiction
2d § 3553 (West, 1984) 16

TO THE HONORABLE SUPREME COURT:

Connie Reshard, Petitioner files this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, to review the orders filed on May 25, 1994, in Reshard v. Federico Peña., No 94-5032 (App. at 2) and filed on November 25, 1994, No. 94-5301 App. at 4). Both orders are unpublished.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit was issued on May 25, 1994, No. 94-5032, (MIKVA, Chief Judge, and SENTELLE and RANDOLPH, Associate Judges). App. at 2). The Order dismissed, for lack of jurisdiction under 28 U.S.C. § 1291, Petitioner's appeal of a district court order that denied the disqualification of the judge of record before final judgment.

The Court of Appeals denied rehearing by the Panel and suggestion of en banc review on September 16, 1994. App. at 3. Appellant's Motion to Settle the Record under

Rule 10, Fed.R.App.P. was denied as moot on May 25, 1994. App. at 2. Two members of the original Panel stated that Petitioner had failed specifically to seek a writ of mandamus regarding the disqualification of Chief Judge John Penn. In response to the statement, Petitioner filed a separate Petitioner for a Writ of Mandamus on October 7, 1994. (94-5301) It was denied on November 25, 1994 (Ginsburg, Sentelle, Rogers, Circuit Judges). App. at 5.

On January 31, 1994, the United States District Court for the District of Columbia entered an Order denying Petitioner's Motion to Disqualify the Judge of Record, the Honorable John Garrett Penn, now Chief Judge. App. at 7.

JURISDICTIONAL STATEMENT

This Court's jurisdiction to review the Order of the United States Court of Appeals for the District of Columbia is the subject of this Petition.

Section 1291, Title 28 of the United States Code was invoked for jurisdiction before the United States Court of Appeals for the District of Columbia Circuit. Petitioner sought review under 28 U.S.C. 1651 (a), and the collateral order doctrine.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION:

AMENDMENT V READS: No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

AMENDMENT XIV READS: [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

FEDERAL STATUTES:

28 U.S.C. § 144 App. at 18

28 U.S.C. § 455 App. at 19

28 U.S.C. § 753(b) App. at 20

28 U.S.C.A. § 1254 App. at 23

28 U.S.C.A. § 1291 App. at 24

28 U.S.C. § 1292 (b) App. at 24

28 U.S.C. § 1651(a) App. at 25

STATEMENT OF CASE

This is an issue of jurisdiction. Petitioner seeks review of the order that denied disqualification of the district court judge of record by that the judge, at the pre-answer stage.

On October 15, 1987, Petitioner filed a cause of action under 42 U.S.C. §2000(e) et seq., alleging a systematic and continuing pattern of racial discrimination. A Motion for a Temporary Restraining Order and Preliminary Injunction was filed on October 19, 1987 seeking protection from day-to-day harassment and retaliation imposed on Petitioner for charging the Office of the Secretary of the Department of Transportation with violations under the statute. The Restraining Order was denied on October 21, 1987 and the Preliminary Injunction was denied on January 29, 1988.

During the pendency of these protective motions, Petitioner was fired from her position at the Department of Transportation for failure to attend two staffing meetings, acts that were a continuing component of harassment and reprisal that Petitioner had complained about. Specifically, Petitioner was held up to ridicule in a staff meeting before her peers when she was compared to a white male who is subordinate to her professionally. No investigation was ever undertaken by the Department of Transportation. Petitioner was banished from the Nassif Building at 400 Seventh Street, S.W., Washington, D.C. 20590 on January 4, 1988. The Department of Transportation, including present and formal officials, took steps to prevent Petitioner from obtaining future employment.

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit, No. 88-5035, on February 3, 1988. The appeal was affirmed. However, the Record as presented to the Court of Appeals was an inaccurate account of court proceedings.[1] Soon after discovering the

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[1] The transcripts were transcribed for the appeal and not reviewed by Appellant before they were made available to the Court of Appeals.

inaccuracies in the record, Petitioner began efforts to correct the record. She first notified the Clerk of the District Court, Harry Deutsch (the court reporter) and all of the parties to the lawsuit. At the same time, she requested access to the original audio tapes/notes and original stenographic tapes from the Clerk of the United States District Court and Harry Deutsch. The Clerk's office did not respond and returned the document that had notified it of the inaccuracies and as well as Petitioner's request to review the original audio and stenographic tapes. Petitioner, then referred the matter to the administrative offices of the United States Court of Appeals for the District of Columbia Circuit. The matter was referred back to then District Court Judge John Garrett Penn. An exchange of letters occurred all of which pointed to inaccuracies specifically and requested the original audio tapes and original stenographic tapes/notes. No relief was obtained.

Subsequently, Petitioner filed a Motion to Disqualify Judge Penn on September 27, 1989, at which time the Clerk

refused to docket it without Judge Penn's permission. Assistant United States Attorney William Dempster responded after several timely Motions to extend the time in 1989. It took Judge Penn from 1989 until January 31, 1994 to issue a decision on the pending Motion, thus he effectively stopped the case for an additional four (4) years. Judge Penn did not disclose this Motion to the public as is required under 28 U.S.C. § 476 of the Civil Justice Disclosure Act. This Section requires the disclosure of all motions pending for a period of six months. It was pending for a period from 1989 to 1994.

Petitioner filed an appeal of the January 31, 1994 order (94-5032) which was dismissed for lack of jurisdiction. App. at 2. Petitioner had sought correction of the record under Rule 10 of the Federal Rules of Appellate Procedure. The Motion was dismissed as moot. A rehearing by the Panel and suggestion of rehearing en banc were both denied. App. at 3. At the same time Petitioner sought to obtain permission from Judge Penn to take the depositions of the court reporter,

a court clerk, Judge Penn's law clerk and former Assistant U.S. Attorney William Dempster during the pendency of the appeal pursuant to Rule 27(b) of the Federal Rules of Civil Procedure. The Motion was denied by Judge Penn. Petitioner took an appeal, No. 94-5129. It was denied for lack of jurisdiction on September 14, 1994.

The following discourse outlines some of the issues in contention.

TRANSCRIPTS: A subsequent review of the transcription of proceedings principally, January 11, 22, and 28, 1988, is discussed herein.

Transcript January 11, 1988: Page 12, line 19. In open court, Mr. Dempster admitted that no service of the notice to terminate had ever been executed. He did so in a distinct manner with a long pause before arguing that I allegedly avoided service. This is the accurate account and it has been altered to eliminate this admission and to give this inaccurate account: "With respect to her specific allegation before the

Court today, that she received no notice of removal, let me say, your Honor, that Ms. Reshard has studiously . . . ." App. at 17.

Transcript January 22, 1988: Page 11, line 4: I explained that Mr. Bruce Butterworth, Petitioner's immediate supervisor at the time directed her to obtain instructions on how to perform an assignment from a coworker and peer. As a trained economist, former college assistant professor of economics, and an attorney, Petitioner already knew how to do so, a fact known to Mr. Butterworth. The meaning and significance of the harassing nature is reduced when the court reporter inserted "as you will" in the sentence. This "as you will" suggests that Petitioner was given a suggestion, not a direct order, which by its nature has the implication that Petitioner could not perform the routine assignment. App. at 17.

Transcript January 28, 1988: Two telephone conference calls were held, recorded and transcribed by Harry Deutsch, court reporter. To Petitioner's knowledge, then U.S. District Judge

John Garrett Penn, Kim Keenan, Assistant U.S. Attorney William Dempster and Petitioner participated.

Two omissions occurred: Judge Penn limited the scope of settlement talks to the issue of termination of employment.[2] During the second telephone conversation, near the end of the conference call, Petitioner specifically asked Judge Penn to make a ruling on the injunction but Petitioner also wanted to confer with the other side on the termination. Before ending the conference call, Petitioner asked Judge Penn about when the settlement talks would begin. He stated that the settlement "talks are no longer available." This is the accurate account of the discussions. However, this account has been omitted in the transcript and the Order denying the injunction issued the very next day suggests that Petitioner was totally uncooperative.

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[2] The Department of Transportation had issued termination papers (signed by an employee who lacked authority to execute them, a GM-14 , the exact grade as Petitioner at the time the document was said to have been executed.) The person who had the authority at the time to authorize the personnel action, Assistant Secretary Matthew Scocozza died on November 8, 1991.)

Traditionally, negotiations are urged before the status quo has been changed between the parties, not after the person has been fired during the pendency of court proceedings where relief had been sought from the court.

INSERTION OF OUT OF TIME MOTION FOR ENLARGEMENT OF TIME: Then Assistant U.S. Attorney William Dempster failed to file a timely Motion for Extension of Time in which to either answer the complaint or file a pre-answer motion on December 21, 1987. Instead he filed such a Motion for Extension of Time after the time had expired without supporting legal requirement under Rule 6(b)(2) of the Federal Rules of Civil Procedure. When Plaintiff filed a Motion for Default Judgment on December 28, 1987, entry no. 16 was the only such Motion to have been filed. Indeed, the receiving clerk refused to accept my Motion for Default Judgment and was persuaded to do so only after reviewing the Docket Sheet and verifying that only one Motion for an

Enlargement of Time had been filed by Assistant U.S. Attorney Dempster on the 22nd after the time to act had expired.[3]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Whether an Order Denying the Disqualification of District Court Judge is Immediately Appealable.

The United States Supreme Court has not ruled on the issue of appealability. The Circuits have created an inconsistent body of law on the issue.

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[3] It appears that upon receipt of my Motion for Default, the record was corrected by allowing Mr. Dempster to insert a second Motion for the Enlargement of Time which was now said to have been filed on December 21, 1987. It was not timely filed. The Order granting the two Motions was dated December 28, 1987 the same day when only one Motion had been received by the clerk's office. It was, of course, signed by Judge Penn although it too was not entered on the docket sheet. Both were received by the Petitioner between two and three weeks later and no postmark stamp was on either envelope. Jeffrey Atkins was the docket clerk responsible for the file, and he has not provided an explanation for the events stated earlier.

A. Immediate Appellate Review Would End The Confusion Among The Circuits.

The majority of Circuits have permitted some form of immediate review of an order involving the disqualification of a judge. Kelley v. Metropolitan County Bd of Ed of Nashville, 479 F.2d 810 (6th Cir. 1973). There that court held that the grant of recusal was a final order even though the case had not concluded. A grant of an order disqualifying the judge of record has also been immediately appealable under the certification procedures of 28 U.S.C. § 1292 (b). In re New Mexico Gas Antitrust Litigation, 620 F.2d 794 (1980); In re Virginia Elec. & Power Co., 539 F.2d 357, 364 (4th Cir. 1976); but compare, Hampton v. City of Chicago, 643 F.2d 478, 479 (7th Cir. 1981) (grant of recusal involved no protectable interests of having a particular judge sit in a case.)

Some courts of appeal have found jurisdiction when another appealable item is contained in the order regarding the disqualification of a federal judge. In re Federal Skywalk Cases,

680 F.2d 1175, 1180-1181 (8th Cir. 1982) (preliminary injunction); In re Grand Jury Investigation, 486 F.2d 1013 (3d Cir. 1976)(contempt order); see also In re N/O, Inc., 5 F.3d 154, 160 (6th Cir. 1993); Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993). The issues raised under Section 753(b) and (c) would seem to satisfy this requirement.

Many of the Circuits now grant some form of immediate review of orders denying disqualification by a judge via a writ of mandamus, it would seem that review of this petition is appropriate. In In re School Asbestos Litigation, 977 F.2d 764, 777 (3d Cir. 1992), the Third Circuit stated:

> "Although, we do not rule out the use of interlocutory and final appeals to review disqualification decisions we also refuse to rule out the use of mandamus petitions on the ground that those other avenues provide a presumptively adequate means of relief." Emphasis Added.

In fact some Circuits have also stated that these cases should be heard at the earliest stage possible. Id.; Union Carbide Corp. v. United States Cutting Service, Inc., 782 F.2d 710,

712-713 (7th Cir. 1992). Indeed the Seventh Circuit requires review by mandamus of an order denying disqualification of a judge immediately and does not allow an appeal to be taken at the final judgment stage. Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249 (7th Cir. 1993); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991), cert. denied ___ U.S. ___, 111 S.Ct. 2019, 114 L.Ed.2d 105 (1992). Review via a writ of mandamus is clearly documented throughout the Federal Courts.[4]

Several commentators also support immediate review of an order denying the disqualification of a judge. Moore,

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[4] United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1986); Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir, 1985); In re United States, 666 F.2d 690 (1st Cir. 1981); United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981); In re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980); Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978); In re Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976); Minnesota & Ontario Paper Co. v. Molyneaux, 70 F.2d 545 (8th Cir. 1934).

Appellate Review, 35 Hastings L.J. 829 (1984); Note. Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies, 67 Iowa L.Rev. 525, 540-54 (1982). Another commentator noted the following:

> "The law on appellate review of orders with regard to disqualification is in the process of change. Both when the trial judge disqualifies himself [or herself] and when he [or she] refuses to do so there is a distinct movement toward making appellate review more readily available . . . . Wright, Miller & Cooper, Federal Practice and Procedure Jurisdiction 2d § 3553 (West, 1984).

Another commentator concluded that some form of immediate appeal of disqualification cases should be available under the collateral order doctrine, mandamus and certification under 28 U.S.C. § 1292(b).[5] Moore at 830.

> "[T]he question of judicial disqualification goes to the heart of the judicial process and may so fundamentally affect the judgment that immediate review is necessary to protect the adversely affected party and the judicial

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[5] Certification of this case for appeal under section 1292(b) was not a viable option because a judge who denies a Motion to Disqualify herself or himself is unlikely to do so.

> process itself. Id. at 829. "Review after final judgment of the case will often be inadequate, and the costs of immediate appellate review are relatively slight." Id at 867. Emphasis Added.

This comment is especially noteworthy given the more than four years time period in which the Motion to Disqualify was pending before then District Court Judge John Garrett Penn.

Many Circuits have held that this class of orders are not immediately appealable under Sections 1291 and 1292 (b). City of Pittsburgh v. Simmons, 729 F.2d 953, 954-55 (3d Cir. 1984); In re Corrugated Container Antitrust Litigation 614 F.2d 958, 960-61 (5th Cir.), cert. denied, 449 U.S. 888 (1980).

B. The Collateral Order Doctrine is Appropriate For This Class of Cases

The collateral order doctrine allows a judgment that is otherwise not complete and final to be immediately appealable under 28 U.S.C. § 1291. Cohen v. Beneficial Industrial Loan

Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949) and its progeny, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d. 351 (1978).

> "final disposition of a claimed right, which is not an ingredient of the cause of action and does not require separate consideration with it, is an appealable order within the meaning of § 1291 . . . finally determined claim of right separate from, and collateral to, rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), the Supreme Court stated that appellate jurisdiction would apply in classes of cases where the issue presented would "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the case and [is] effectively unreviewable on appeal from the final judgment."

According to Moore,

> "The first two Cohen requirements, that the district court order finally determine an issue collateral to the merits of the action, do not pose significant difficulty in judicial disqualification cases. A trial judge's decision

> not to disqualify himself is final as the order denying imposition of security obligations in Cohen. In both situations, despite a technical possibility of reopening the issue at the trial court level, the litigation proceeds with respect to other issues on the assumption that the judge's decision is final. Moreover, whether based on allegations of proscribed relationships or bias, the determination of the disqualification issue is separable from the merits of the case. Disqualification revolves around the judge's relationships to the parties and his state of mind, and is to be resolved without consideration of his judicial rulings." Id. at 857.

I agree. There are claimed rights of a fundamental nature present here as well. The accuracy of court proceedings is a fundamental right in our system of justice. This Appellant's rights under 28 U.S. § 753(b) and (c) and the right to a fair and impartial tribunal are of high standing.

The Court has conferred the provisions of immediate appeal under the collateral order doctrine to orders denying governmental immunity under the Eleventh Amendment of the Constitution. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., __ U.S. __, 113 S.Ct. 684 (1993).

Since only one motion of disqualification can be filed in the same case, the issue is finally determined upon order of the court.

Another consideration is that the appearance of impartiality standard of 28 U.S.C. § 455(a) has little veracity at the final judgment stage. discussion infra.

Accordingly, this Court should accept jurisdiction under the collateral order doctrine.

C. Underlying Constitutional Provision of Due Process Should Enjoy the Same Immediate Appellate Review as Does First Amendment Issues of Free Speech.

This Court has accorded the right of immediate appellate review of certain cases raising first amendment issues of "free speech." Ft. Wayne Books, Inc. v. Indiana, 489 U.S. 45, 109 S. Ct. 916 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). "Adjudicating the proper scope of first amendment

protections has often been recognized by this Court as a "federal policy" that merits application of an exception to the general rule of finality." 489 U.S. at 56. And more recently, the Court extended such appellate rights to an Eleventh Amendment claim of immunity by a local entity, that claimed to be "an arm of the state." Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., ___ U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605, on remand, 991 F.2d 935 (1st Cir. 1993). This Court took the position that the Eleventh Amendment immunity issue would be lost during the course of the trial. A similar situation exist here particularly since issues regarding the preservation and integrity of the record are in issue.

Petitioner asserts that the same right should be extended to orders of disqualification of judges, that have as an underlying right, U.S. Constitutional "due process of law." Just as the Court has acknowledged the special status of First Amendment and Eleventh Amendment rights, it should now

consider conferring equivalent provisions of appeal for the disqualification of federal judges.

The Court has provided an excellent analogy regarding the importance of rights protected under sections 144 and 455 as well as the constitutional requirements of due process of law, in its decision in In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 624-627, 99 L.Ed. 767 (1955).

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Tumney v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

> "There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge. If there have been they might have been able to refute the judge's statement about White's insolence. Moreover, as shown by the judge's statement here a "judge-grand jury" might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.

Issues of disqualification of federal judges must be distinguished from the disqualification of attorneys. An individual right to a specific attorney does not enjoy the same parity as the right to a fair and impartial tribunal, a cornerstone of a democratic society at its very core. In Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S. Ct. 2757, 86 L.Ed.2d 340 (1985), lower courts were criticized for conferring the collateral order doctrine to orders denying the disqualification of an attorney.

D. Section 455 (a)'s Appearance of Impropriety Standard Should be Immediately Appealable Because the Standard Cannot be Reviewed Effectively at the Final Judgment Stage.

Under Section 455(a), a judge is required to recuse herself/himself for the appearance of impropriety. Section 455(a) is a self-executing provision imposed upon each and every federal judge by statute and does not require that it be specifically raised in any federal court. Once an issue of disqualification is raised, the standards of conduct set forth in Section 455(a) must be reviewed by each federal tribunal. Roberts v. Ballar, 625 F.2d 125, 128 (6th Cir. 1980) That Panel stated that,

> "The District Judge had an independent duty to recuse himself, however, under 28 U.S.C. §455(a). Section 455(a) is a self-executing provision for the disqualification of federal judges.[7] There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a).[8] Instead, the section sets forth a mandatory guideline that federal judges must observe sua sponte[9]" citations omitted. Id.

Section 455(a) requires disqualification of a federal judge if the appearance of judicial impropriety is present. The problem is of course if the appearance of impropriety is reviewed at the final judgment stage, courts will ultimately review a violation under this section only if it believes that the judge has, in fact, actually demonstrated a personal bias or prejudice toward the complaining party. To do so, leads to the effective repeal of the "appearance of impropriety" standard. The provision is worthless, unless such orders denying the disqualification of a judge are reviewed immediately. And since Section 455(a) applies to all issues of disqualification in the federal judiciary, issues arising under Section 144 are appealable as well.

II. The Issuance of a Writ of Mandamus is Appropriate in this Case.

On November 25, 1994, the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's

request that it issue a writ of mandamus to Chief Judge John Garrett Penn, directing him to withdraw from this case and the implementation of other instructions regarding the correction of the record as is consistent with federal law. The issuance of such a writ is consistent with guidelines from the this Court.

This Court has left sufficient discretion to the court of appeals under the special writs set forth in 28 U.S.C. § 1651(a) and this Court's supervisory powers under 28 U.S.C. § 2106 to correct a manifestation of judicial injustices which have been imposed on Connie Reshard. Due process of law, a basic tenet of our democratic system which is set forth in the Fifth (Fourteenth) Amendment of the United States Constitution requires that all cases be heard before a fair and impartial tribunal. Due process of law is the underlying basis for the provisions contained in 28 U.S.C. §§ 144, 455 and 753. Against this backdrop, it would seem that this Court should take appropriate steps to correct the injustices raised in

this Petition, and to terminate any further participation in this case by Chief Judge John Garrett Penn.

This Court has the authority to issue a writ of supervisory mandamus in this case even if jurisdiction has not already been conferred on the court of appeals. The Court has upheld the use of extraordinary writs to review an order otherwise reviewable upon final judgment. LaBuy v. Howes Leather Co., 352 U.S. 249, 257, 77 S.Ct. 309, 314, 1 L.Ed.2d 290 (1957); 9 Moore's Federal Practice ¶ 110.26. The Court stated,

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. 352 U.S. 249, 259-260, 77 S.Ct. 309, 315.

The Court went a step further in support of the broader use of the mandamus device in Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). In McClellan

v. Carland, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762 (1910), the Court stated,

> "the general rule both for the courts of appeals and the Supreme Court that the power to issue an appropriate writ under section 1651 is not limited to where appellate jurisdiction has already attached. Thus under section 1651 a court of appeals may issue an appropriate writ . . . in aid of its exercised jurisdiction, or in aid of its then existing or prospective appellate jurisdiction over the district courts . . . Indeed, the writ may issue to review conduct that is not otherwise reviewable by appeal. The "jurisdiction of a court of appeals comprehends its responsibility for orderly, even, and efficient administration of justice within its circuit." Emphasis Added.

Surely, "Congress cannot have intended that . . . arbitrary judges who refuse to behave as judges" should proceed undeterred whatsoever to the parameters of the law. See also Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 25, 63 S.Ct. 938, 87 L.Ed 1185 (1943); But compare Will v. United States, 389 U.S. 90, 95-96, 103-104, 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); Kerr v. United States District Court

of California, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

The Supreme Court has long noted that a writ of mandamus is available when appeal from a final judgment would not provide effective relief. Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed 481 (1921). In Berger, the Supreme Court entertained the issue of a writ of mandamus in the disqualification of a district court judge. Unlike Berger, Petitioner challenges the accuracy of the stenographic record. 41 S.Ct. 230, 235.

Essentially, the Court has conferred on courts of appeal the use of section 1651 when there exist a clear abuse of discretion or a clear violation of law. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed 106 (1953). Nonetheless, in the case presented, the lower court has abused its discretion and erred as a matter of law in a fundamental area of our system of justice, the integrity of the record.

A. A Clear Violation of Law Has Occurred, Which Entitles Petitioner to Immediate Appellate Review.

The failure of the district court judge to correct the record and to authorize the release of all original tapes as is required by Section 753(b) and (c) constitutes a clear violation of law. Antoine v. Byers & Anderson, Inc., 502 U.S. __, 113 S.Ct. 2167, 2171-2172 (1993). The presumption of accuracy of the official record of court proceedings under § 753 is a rebuttal presumption. In order to demonstrate that the official record does not conform to the truth, complete access to all original stenographic tapes, original audio tapes, and original notes must be made available to any party who request such documentation. The input of persons who were present during the proceeding may be used as a source of information, but their statements are not the final word since they have a stake in the outcome, particularly when issues of

accuracy concern material evidence. The mere fact that the court reporter and the judge of record have refused to grant access of this information to Petitioner is a clear and indisputable ground that the record does not conform to the truth of what actually transpired. Equally important, access to the tapes is the least expensive process and would have led to the resolution of that part of the issue at a very early stage in the complaint. Accordingly, Petitioner is entitled to a writ of mandamus that compels Chief Judge Penn to the lawful exercise of power.

This Court has issued a writ of mandamus that compelled a district court judge to lawful exercise of power. Mallard v. United States District Court for Southern District of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). The Mallard Court issued a writ when a district court judge compelled an attorney with just six months of experience to handle a significant criminal case brought by two indigents against prison officials. The Court relied upon the fact that the

district judge violated 28 U.S.C. § 1915(d), indicating that the judge had exceeded its jurisdiction through "coercive appointment of counsel." Surely, the attorney could have appealed the failure of his handling of the lawsuit and the prisoners could have moved to set aside the verdict or judgment in the case due to the lack of expertise by the appointed counsel. Yet the Court was concerned about the clear violation of section 1915(d) by the district court judge.

The same compelling circumstances are present here. Violations of 28 U.S.C. § 753(b) and (c) should end now. Chief Judge Penn issued an order compelling Petitioner to respond to the Motion to Dismiss or in the Alternative, a Partial Summary Judgment by October 11, 1994 without any effort on his part to allow for the correction of the record and before the District of Columbia Circuit had issued the mandate. We must not place the incorrect record above the law by not taking seriously a challenge to the court reporter's version of the record in face of a former complaint. Section 753 confers

a rebuttal presumption of validity. Once such a complaint has been received, the court reporter has the burden of demonstrating that he or she has complied with section 753 and must make all original tapes and notes available for full public scrutiny. In doing so, our democratic system is made stronger through the immediate full disclosure of such materials and through the immediate correction of the record, rather than a prolonged delay in the implementation of a corrective course of action. The public loses confidence in the integrity of the federal judiciary when the system is slow to respond to a complaint of misconduct.

The failure of the district court to comply with section 753 by making the tapes public is a per se violation of due process of law. The original tapes are the best and least expensive means to end this issue of contention.

While the issues presented in this case are civil matters, deliberate tampering with the record is "obstruction of justice." Chief Judge Penn has been asked to rule on the accuracy of the

record, part of which covers the accuracy or omission of his own statements. As a result of this fact, he is placed in a position of having an interest in the outcome, just as the defendant and court personnel have an interest in the outcome. Corroboration through the original audio tapes and stenographic notes, have not been made available to Petitioner by the court reporter, Chief Judge Penn or the Clerk of the District Court. By withholding this vital information in violation of 28 U.S.C. § 753 (b) et seq. and then declaring themselves innocent of any wrong doing does not conform to substantive or procedural due process of law. They are in essence sitting in judgment of themselves. They have refused to act consistent with Federal laws governing the integrity of the record and such conduct is a clear and indisputable violation of 28 U.S.C. § 753 (b) et seq.

Further, if they choose to destroy such evidence in violation of federal law, Petitioner is deprived of access which is lost forever. Reconstruction of the record may be impaired if

all original evidence is not preserved. Such tampering with evidence is more likely to occur in the future. At the end of the case, will an appellate court declare Petitioner's version of the record the official version, once destruction of the evidence has occurred. It may be too late for Petitioner and the appellate court to reconstruct the entire record accurately enough when a key element of what transpired has been destroyed, original audio tapes and stenographic tapes.

B. Extrajudicial Exception -- "Deep-seated Favoritism Warrant Disqualification

Petitioner presented an Affidavit of Bias and Prejudice which stated the facts with particularity. App. at 25. All facts stated with particularity are to be taken as true. United States v. Halderman, 559 F.2d 31, 131 (D.C. Cir. 1976). "The affidavit must be strictly construed; it must be definite as to time, place, persons and circumstances . . . must give fair support to the charge of a bent of mind that may prevent or

impede impartiality of judgment." Id. at 134. Petitioner met this burden.

The fact that the misconduct complained of occurred during the course of the litigation in this case is not fatal. When the conduct of the district court judge shows the level of "deep-seated favoritism or antagonism that would make fair judgment impossible" disqualification can be supported by an affidavit containing elements that occurred during the course of judicial proceedings. Liteky, et al. v. United States, __U.S. ___, 114 S.Ct.1147, 1155 (1994); Davis v. Board of School Comm'ns of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975) cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); see also, United States v. Halderman, 559 F.2d 31, 134 ("We do not mean to suggest that a judge's activities during the course of judicial proceedings can never reflect a disqualifying state of mind."); Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968); (Comments and rulings by judge during trial of case may be relevant to question of

existence of prejudice on his part.); Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 439 (D.C.VA 1971)(Prejudgment as to facts giving rise to liability or reason to believe such exists, if fairly supported, would establish bias or prejudice requiring judge to disqualify himself.).

Given the nature of issues presented, the intrajudicial incidents cited in the Affidavit of Bias and Prejudice cannot be viewed in isolation but must be considered within the totality of all circumstances and incidents of judicial bias presented. In this regard, Petitioner has presented a legally sufficient Affidavit that would warrant disqualification of the district court judge. He has deep-seated prejudice and bias against Petitioner. Moreover, he has become so entangled with personal feelings against this party as a result of the course of events and proceedings in this case, so that he is unable to execute the administration of justice. The issue of the incorrect record is a serious matter that this Court should resolve.

The issues presented in this disqualification case are not just about facts gained during the course of litigation or opinions of the judge. This is about obstruction of justice involving the district court judge, the court reporter, a member of the clerk's staff and an assistant United States attorney. Why has Petitioner been labeled a troublemaker by some when no full investigation has taken place. Petitioner should not be judged by her style, but based upon her entitlement as a matter of law. It is not customary for a member of the Federal service to be fired for the reasons set forth for Petitioner or in the manner in which the firing was undertaken particularly during the course of litigation such as was present here. This is just not right. Because Petitioner grew up believing that democracy provided the system to correct any wrong, she has endeavored in face of the adversity dealt her. Petitioner has cooperated and has all ways been willing to take a polygraph test. Instead, she is left penniless and black listed in the job market. Petitioner was fired for not attending two staff meeting (which did not

affect nor impair in anyway her ability to conduct her job duties) because her supervisor held her up to ridicule in front of her peers. The Department of Transportation conducted no investigation of Petitioner's charges, a violation of due process of law. We certainly should not call the actions taken in the United States District Court as anything approaching due process of law given the nature of the complaints raised regarding the accuracy of the record.

C. Use of Court's Supervisory Authority Is Warranted Under These Facts and Should Be Sufficient for Granting Immediate Appellate Review.

The district court judge's ability to exercise impartiality in this case given the state of affairs continues to erode. Petitioner believes that the district judge is no longer capable of continuing in this case, irrespective of the legal sufficiency of the Affidavit of Bias and Prejudice. Cook v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed 767 (1955); In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623,

625, 99 L.Ed 942; Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed 11 (1954). The Supreme Court has stated that a judge should recuse himself when he becomes so entangled with personal feelings against a party or litigant that he cannot perform the administration of justice. Id. His refusal to take any action to correct the record or to allow the perpetuation of testimony should not be allowed to continue.

Other circuits have granted a writ in cases similar to the magnitude of the issue in this case. The District of Columbia Circuit issued a writ of mandamus when a district court judge delegated to a master the final - determination of certain elements in issue in the case even though appeal from a final order appeared to be available.[6]

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[6] In re Briscoe, 976 F.2d 1425 (D.C.Cir. 1992); See also Chase Manhattan Bank, A.A. v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir 1992); In re Hooker Insurance, Inc., 937 F.2d 1350 (3d Cir 1993); In re School Asbestos Litigation, 977 F.2d 764 (3d Cir 1992); In re Sharon Steel Corp., 918 F.2d 434 (3d Cir. 1990); In re Pruitt, 910 F.2d 1160 (3d Cir. 1990); Delgrosso v. Spang and Co., 903 F.2d 234 (3d Cir. 1990); In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir 1992); In re Fibreboard Corp.,

In summary, Petitioner urges the Court to issue the writ of certiorari because orders involving the disqualification of a judge should be immediately appealable in general and, specifically, when clear violations of the United States Constitution and Sections 144, 455(a) and 753 (b) & (c) are in issue.

Respectfully submitted,

CONNIE RESHARD, ESQUIRE
224 Upshur Street, N.W., #1
Washington, D.C. 20011
(202) 882-3515

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893 F.2d 706 (5th Cir 1990); In re King World Productions, Inc., 898 F.2d 56 (6th Cir. 1990); Mafnas v. United States District Court for the Northern Mariana Islands, 919 F.2d 101 (9th Cir. 1990); Borjav v. United States District Court for the Northern Mariana Islands, 919 F.2d 100 (9th Cir. 1990); Valenzuela-Gonzalez v. United States District Court for the District of Arizona, 915 F.2d 1276 (9th Cir. 1990); McNeil v. Guthrie, 945 F.2d 1163 (10th Cir. 1991); In re Smith, 926 F.2d 1027 (11th Cir. 1991).

INDEX

ORDER, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, MAY 25, 1994 2

ORDER, REHEARING EN BANC, SEPTEMBER 16, 1994 3

ORDER, PETITION FOR WRIT OF MANDAMUS, NOVEMBER 25, 1994 5

ORDER, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, JANUARY 31, 1994 7

PERTINENT PORTIONS OF TRANSCRIPTS 17

FEDERAL STATUTES

- 28 U.S.C. § 144 18
- 28 U.S.C. § 455 19
- 28 U.S.C. § 753 20
- 28 U.S.C. § 1254 23
- 28 U.S.C. § 1291 24
- 28 U.S.C. § 1292 24
- 28 U.S.C. § 1651 (a) 25

AFFIDAVIT OF BIAS AND PREJUDICE 25

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No 94-5032 September Term, 1993

87cv02794

Connie Reshard,

Appellant

v.

Federico F. Peña, Secretary, United States Department of Transportation

Before: Mikva, Chief Judge; Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of the motion to settle the record and the motion to dismiss or, in the alternative, for summary affirmance, the response thereto and the reply, it is

ORDERED that the motion to dismiss for lack of jurisdiction be granted. Denial of a motion under 28 U.S.C.

§ 144 is reviewable on appeal from a final judgment. See City of Pittsburgh v. Simmons, 729 F.2d 953, 954-55 (3d Cir. 1984); In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 960-61 (5th Cir.), cert. denied, 449 U.S. 888 (1980). No final judgment has yet been entered by the district court in this case. It is

FURTHER ORDERED that the motion to settle the record be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

/s//s//s/

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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No 94-5032 September Term, 1993

Connie Reshard,

Appellant,

v.

Federico F. Peña, Secretary, United States Department of Transportation

Appellee

Before: Edwards, Chief Judge; Wald, Mikva, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

Ordered, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:

RON GARVIN,

CLERK

BY: /S/

Robert A. Bonner

Deputy Clerk

Circuit Judge Mikva did not participate in this matter.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 94-5301 September Term, 1994

In Re: 87cv02794

Connie Reshard,

Petitioner

Before: Ginsburg, Sentelle and Rogers, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has failed to demonstrate that her right to mandamus relief is clear and indisputable. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); In re Thornburgh, 869 F.2d 1503, 1507 (D.C. Cir. 1989). The district judge properly reviewed the legal sufficiency of the 28 U.S.C. § 144 motion and petitioner's allegations fail to establish the sort of bias required for judicial disqualification. See Liteky v. United States, 114 S. Ct. 1147, 1155 (1994). See also In re School Asbestos Litigation, 977 F.2d 764, 774-76 (3d Cir. 1992) (mandamus relief reserved for extraordinary circumstances such as ensuring that judges do not adjudicate cases they have no statutory power to hear).

Per Curiam

/s/

/s/

/s/

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Connie Reshard,

Plaintiff,

v. Civil Action No. 87-2794 (JGP)

Federico F. Peña,[1] Secretary, U.S.

Department of Transportation,

Defendant.

MEMORANDUM ORDER

This matter is before the Court on plaintiff's Motion to Disqualify and Supporting Affidavit ("Motion")

[1] Pursuant to Fed. R Civ. P. 25(d), Federico Pena in his official capacity as Secretary of Transportation has been substituted for Jim Burnley.

defendant's opposition thereto. Plaintiff, a pro se[2] litigant requested that this Court recuse itself pursuant to 28 U.S.C. § 144. Plaintiff contends that this Court has "personal bias and prejudice against the Plaintiff in favor of the Defendant." Motion p. 2.

Plaintiff's affidavit alleges that this Court "has knowingly made false statements of fact in order to buttress Defendant's case." Affidavit p. 1 ¶ 3. Additionally, plaintiff claims that the Court instructed the Court Reporter to make material alterations in the transcript of proceedings in the case and that the Court "back dated an order which gave the Defendant additional time to file a response to the complaint" in order to avoid granting plaintiff's motion for a default judgment. Affidavit p. 1

"It is well settled that the involved judge has prerogative, if not the duty of passing on the legal sufficiency

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[2] Plaintiff, an attorney, is a member of the Commonwealth of Pennsylvania Bar.

of the section 144 challenge." U.S. v. Halderman, 559 F.2d 31, 131 (D.C. Cir. 1979) (citations omitted). This Court has reviewed plaintiff's motion and the accompanying affidavit and finds that the affidavit is legally insufficient.

The Standard of Removal

"Section 144 requires the trial court to withdraw from a proceeding whenever a party files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party." U.S. v. Flat Motors of North America, Inc., 512 F.Supp. 247, 250 (D.D.C. 1981) (quoting 28 U.S.C. § 144). Additionally, the certificate must be "accompanied by certificate of counsel of record stating that it is made in good faith." 29 U.S.C. § 144. A certificate of good faith was filed with plaintiff's affidavit. Since plaintiff is proceeding pro se, it is not necessary that she be a member of the bar of this Court in order to sign the certificate.

"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 1710 (1966), Berger v. United States, 255 U.S. 22, 31, 41 S. Ct. 230, 232 (1921). Therefore, it is plaintiff's responsibility to demonstrate that the statements and acts she attributes to this Court stem from an extrajudicial source and are not information gleaned from the proceedings and filings in the case.

"[T]he affidavit must meet exacting standards.[3] . . . Assertions of a conclusionary nature are not enough, nor are opinions or rumors.[4] And the affidavit must give fair support to the charge of a bent of mind that may prevent or impede

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[3] U.S. v. Halderman, 559 F.2d at 135.

[4] Action Realty Co. v. Will, 427 F.2d 843, 844 (7th Cir. 1970).

impartiality of judgment."[5] For the purposes of the motion, the Court must take all facts stated with particularity as true." United States v. Halderman, 559 F.2d 31, 131 (D.C. Cir. 1976) (citations omitted). This Court will not render an opinion on the accuracy of plaintiff's allegations but will focus on whether the allegations are legally sufficient and thus necessitate this Court's disqualification.

"The legal sufficiency of the affidavit is determined by ascertaining whether it contains facts that would convince a reasonable man that a bias exists." United States v. Archbold-Newball, 54 F.2d 665, 682 (5th Cir. 1977) quoting Curl v. IBM, 517 F.2d 212 (5th Cir. 1975), cert. denied, 425 U.S. 943, 96 S. Ct. 1683 (1975). Plaintiff made several conclusory allegations in the affidavit.

False Statement

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[5] Berger v. United States, 255 U.S. 33-34, 41 S. Ct. 230-233.

Plaintiff's affidavit does not demonstrate that this Court has made any extrajudicial statement or ruling or that the Court was biased in favor of the government. The "false statement" that plaintiff refers to is part of a Memorandum Order filed in this case on January 29, 1988. Plaintiff objects to the following statement:

> "During oral argument on one of the motions, plaintiff stated that she felt it was "a racial slur" to ask her to solicit comments or advice from Mr. Marvich, who is white and has a lower grade." See, Memorandum Order p. 1

Plaintiff objects to the Court's characterization of her statement. The Court's statement is clearly not extrajudicial; it is part of an order concerning motions pending before the Court.

Additionally, the Court notes that plaintiff's Memorandum in Support of Granting Emergency Hearing on Motion for Stay and Motion for Temporary Restraining

Order/Declaratory Order filed January 28, 1988 uses the term racial slur. The memorandum states in part:

> "The issue leading up to [plaintiff's)] removal involves a racial slur made to the Plaintiff by her immediate supervisor, Mr. Bruce Butterworth. Mr. Butterworth compared the plaintiff's ability to conduct her work to another white employee, who is lower in grade and qualifications." (emphasis added)

This term cannot be that objectionable if used by the plaintiff.

The Altered Transcript

Allegedly, this Court instructed Mr. Harry Deutsch, Official Court Reporter, to alter the transcript of the January 28, 1988 hearing. This allegation is actually plaintiff's unsupported conclusion. plaintiff's affidavit states "[r]egarding material changes in the transcripts, some were made which were not reflected in any order signed by Judge Penn. However, under the circumstances, reasonable men would infer that he coordinated the changes with Mr.

Deutsch." Affidavit p.6 ¶ 13. Mere conclusions do not meet the standard set out in section 144.

The Back Dated Order

Plaintiff claims that this Court back dated an order to allow defendant to file motions for an enlargement of time to avoid the entry of default by the Clerk of the Court.[6] This Court entered an order on December 28, 1987, granting defendant an enlargement of time until December 29, 1987 to respond to Plaintiff's complaint. Plaintiff ignores the obvious, the Office of the Clerk of the United States District Court ("clerk's office") accepts motions for filing not this Court. The clerk's office enters all pleadings which are accepted on the docket. Defendant's first and second motions for an enlargement of time are date stamped by the

[6] Plaintiff refers to this as the entry of a default judgment.

clerk's office, December 21, 1987 and December 22, 1987, respectively.

Additionally, it appears that plaintiff is making "much ado about nothing", a motion for the default judgment is not automatically granted because the time has elapsed that no judgment of default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." (emphasis added). Plaintiff's Motion for Default Judgment against Defendant was based entirely on timeliness. See, Plaintiff's Motion for Default Judgment Against Defendant. Plaintiff's motion did not establish a claim or right to relief.

At a status hearing on January 11, 1988, the Court heard argument on Plaintiff's motion for default judgment. Plaintiff's motion was denied. At the January 1988, status

conference plaintiff was directed to respond to defendant's motion for summary judgment by January 20, 1988.[7]

Conclusion

Plaintiff's allegations would not convince a reasonable man that bias exists. Plaintiff's motion contains conclusions and generalities which do not meet the standard set out in 28 U.S.C § 144. Plaintiff fails to meet her burden. Accordingly, it is hereby

ORDERED that Plaintiff's Motion is denied because it is legally insufficient and it is further,

ORDERED that plaintiff shall respond to Defendant's motion for Partial Summary Judgment on or before February 28, 1994.

Date: January 31, 1994 / s /

JOHN GARRETT PENN
Chief Judge

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[7] This date was later extended to February 17, 1988. To date, plaintiff has not filed her response to the motion for partial summary judgment.

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PERTINENT PORTIONS
OF TRANSCRIPTS AS INDICATED

PAGE 11: LINE 4 -- LINE 15, January 22, 1988: "Then I was told, "Well, I've never done anything like this myself, but -- so I can't really tell you how to do it, that's why I didn't include it this document, but you can go and get guidance on how to do this procedure or process or analysis," as you will, "from another member," who is my peer.

PAGE 12, LINE 19 -- PAGE 13, LINE 2, JANUARY 11, 1988: "With respect to her specific allegation before the Court today, that she received no notice of removal, let me say, your Honor, that Ms. Reshard has studiously avoided accepting the notice that was sent to her repeatedly. She studiously avoided accepting the oral notice that the agency

attempted to give her. In fact, she sent some of the written notices that had been sent to her by certified mail, I believe, to me unopened, in an effort, I believe, not to see the notice that the agency attempted to giver her."

JANUARY 28, 1988 TELEPHONE CONFERENCE CALL BETWEEN THE PARTIES FROM JUDGE PENN'S CHAMBERS: This transcript contains omissions although some misstatements are made as well. At the end, Judge Penn, in response to Petitioner's inquiry about the status of the proposed settlement discussions, he said that such "discussions were no longer available."

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28 U.S.C. § 144: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice wither against him or in favor of any adverse party, such judge shall proceed no further

therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 (a): Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b): He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C. §753(b): Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as[1] may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has

been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge

28 U.S.C. §753(c): The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

28 U.S. C. § 1254: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding

instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291: The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292 (b): When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing ins such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §1651(a): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONNIE RESHARD,

Plaintiff,

versus Civil Action No. 87-2794JGP

J. BURNLEY, Secretary, U.S.
Department of Transportation,

Defendant.

AFFIDAVIT OF BIAS AND PREJUDICE

I, Connie Reshard, certify under penalty of perjury that the following statements are true and correct to the best of my knowledge.

1. I am the Plaintiff in the above entitled cause of action.

2. That the Honorable John Garrett Penn, Judge of the court in which this action was commenced and is now pending, and before whom it is to be tried or heard, has a personal bias and prejudice against me in favor of J. Burnley, the U.S. Government, and the facts and reasons for such belief are as follows:

3. In sum, Judge Penn has knowingly made false statements of fact in order to buttress the Defendant's case. He has instructed the court reporter, Harry Deutsch, to make

material alterations in the transcript of proceedings in this case. Further, he back dated an order granting the Defendant additional time to file a response to the complaint after William Dempster, Assistant U.S. Attorney, did not meet legal requirements to make the enlargement of time, and Plaintiff moved for a default judgment. Details in support of these acts are set forth below.

False Statement

3. In a Memorandum Order of January 29, 1988, Judge Penn knowingly made this false account of facts. "During oral argument on one of the motions, the Plaintiff stated that she felt it was a racial slur to ask her to solicit comments or advice from Mr. Marvich, who is white and has a lower grade." Memo Order, 1/29/88. page 2, line 7.

4. This is the accurate account I made in papers filed in the case and in open court, on January 11 and 22, 1988. During a staff meeting of my peers, my supervisor Bruce Butterworth, openly compared me to a white colleague who

is lower in salary grade and overall qualifications. Butterworth compared my ability to perform a specific task and generally to that of the white colleague, Dennis Marvich. This is a typical racial stereotype of perceived inferiority of a Black person as compared to a white person, regardless of the Black person's qualifications. The issue Mr. Butterworth raised was whether I was capable of performing the work task and that Marvich was superior to me. Transcript 1/22/88, page 10, line 1. I was fired because I would not attend staff meetings without assurances that future racial harassment would be prohibited.

5. On the basis of oral argument and papers filed, Judge Penn knew this statement to be false. Further support is found on January 22, 1988 when Judge Penn admonished Plaintiff for raising issues of credibility regarding statements by Mr. Dempster's characterization of the staff meeting incident in the identical light made by Judge Penn in paragraph 3 above. Transcript 1/22/88, page 29, line 14. This just

underscores the fact that Judge Penn's statements were made with deliberation. On January 11, 1988, Mr. Dempster made this statement:

> "Your Honor, that it's my understanding of the exchange, which Ms. Reshard has characterized as a racial slur, indicates that what was said to Ms. Reshard at a staff meeting was that she should simply confer with another employee, a fellow employee, of the agency, to obtain some substantive information regarding an area in which it was believed that she had less experience that that employee." Transcript 1/11/88, page 13, line 10.

Not only did I argue that the above statement was false, I repeated the accurate occurrence of events.

6. Another revealing fact, Mr. Dempster did not mention the 1/11 account of the staff meeting incident in his written submission of January 15, 1988 in support of my being fired. This glaring omission was made despite the fact

that Judge Penn specifically requested the Defendant make this submission of evidence, it only included statements by Arnold Levine, Mr. Butterworth's second in line supervisor. Only after the Plaintiff moved for a declaratory judgment did the Defendant include this false account of the staff meeting incident. These facts underscore the lack of credibility which should have been assigned the government's explanation for the firing of Plaintiff. Instead, Judge Penn adopts it and then assigns it to the Plaintiff.

7. Against this backdrop on January 22, 1988, Judge Penn requested that I explain the staff meeting incident. Transcript 1/22/88, page 10, line 1.

"Ms. Reshard: There was assignment dealings with establishing competitiveness in American industry, sot hat they could become more competitive abroad and can compete better; that's one of the ideas of this administration, that competition is the mold by which we can expand in

international trade. There was a section on services, which I was asked to do. Mr. Marvich was given another section, which he had already been working on.

The Court: Mr. Butterworth --

Ms. Reshard: MR. Butterworth explained to me that, Oh, don't worry, you're probably as good as Mr. Marvich. You know, you are probably as good as he is, you can probably do this." [assignment that is] That was the connotation. Mr. Marvich then replied, "How can you say that? Ms. Reshard has such and such and is even a lawyer."

So, Your Honor, he, too, had the same objective representation that it was negative, and that it relates to the so-called inferiority complex, ..."

I continued with statements about another incident about the airport waiting line problem. Mr. Butterworth told me that he did not know how to explain to me how to do the analyses, but that I should get directions from another

colleague. It should be noted that Mr. Deutsch materially altered this statement in the transcript, by adding [as you will], with the deliberate attempt of suggesting that this consultation was optional.

EXAMPLES OF MATERIAL ALTERATIONS IN THE TRANSCRIPT

8. Judge Penn directed Mr. Deutsch to make material alterations in the transcripts.

9. On January 29, 1989, Judge Penn stated that he did not wish to rule on the pending motions for interim injunctive relief which had been filed by plaintiff dating from October 19, 1987. Instead, he wanted the two sides to enter settlement discussions regarding the firing. I had specifically asked Judge Penn to respond to the scope of the settlement talks. he specifically, stated that only the discharge issue would be involved. When I agree to settlement talks and the issuance of a ruling on the motions, Judge Penn withdrew the settlement talks.

10. The very next day, Judge Penn issued a ruling denying the relief. The order stated that settlement talks were still available to resolve the entire case. When I read the transcript for January 28, 1988, the accurate account of paragraph 9 had been changed to reflect settlement talks for the entire case, even though talks had been withdrawn completely.

11. The settlement talks began on April 21, 1988.[1] They were conducted by the Honorable W. Bryant, a friend of Judge Penn's. The purpose of the settlement talks was to intimidate me into agreeing to an unfair settlement. I was told that I did not know what I was doing. The false statements made by Judge Penn set forth above were repeated by Judge Bryant even though he stated he had read

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[1] [After I filed a notice of appeal on or about the 5th of February 1988, it was then that Judge Penn reinstated the settlement talks via a telephone conversation from his law clerk, Kim Keenan. Immediately after (a day) the court of appeals affirmed the appeal, the talks were actually scheduled.]

the entire record. I was told that I had my facts incorrect regarding the entire case. I was even told that I had ruin my career.* The talks were suspended until I obtained a lawyer. Again, when embarrassing statements were made, S. Popejoy altered the transcript to remove them. Some comments were made off of the record.

13. Regarding material changes in the transcripts, some were made which are not reflected in any order signed by Judge Penn. However, under the circumstances, reasonable me would infer that he coordinated the changes with Mr. Deutsch. For example, one such example is explained in paragraph 7 of this Affidavit. There are others. Plaintiff attempted to obtain the transcript tapes as early as June 1988. The Office of the Clerk refuses to release them. Judge Penn refuses to release them and has insisted that he handle my complaint against Mr. Deutsch. Finally, I sent the

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* It has been nearly two years and no one will give me a job of any kind. [Judge Bryant also told me that I was no "spring chicken."]

complaint to Chief Judge Robinson on January 11, 1989. My complaint about Mr. Deutsch has neither been acknowledged or reviewed by this Court.

BACK DATED ORDER

14. The Defendant was required to file an answer or pre-answer motion on December [21], 1987. He did not do either. Instead, on December 22, 1987, the Defendant moved to enlarge the time under Rule 6(b)(2) of the Federal Rules of Civil Procedure. This rule requires good cause for "failure to act was the result of excusable neglect." This Defendant's motion of 12/22/87 at Docket entry No. 16 failed to meet this burden and should have been denied. This set of events would have lead to a default judgment. Accordingly, Plaintiff filed for a default judgment on December 28, 1987. Before the clerk would accept the filing, she checked the docket entries for a Motion for Enlargement of time; she found the December 22, 1987 Defendant's motion, which was the only one that had been

received. As a result, she then accepted my motion for a default judgment. Up to that time, I had only received the 12/22 Motion for Enlargement of Time, but not the 12/21 Motion.

15. With the assistance of Jeffrey Atkins, Judge Penn and William Dempster, the events were corrected as follows: Mr. Dempster prepared a second Motion for Enlargement of Time which can be found at docket entry 15, on December 21, 1987 extending the time of 12/21 to 12/22. Jeffrey Atkins made the corrections on the Docket Sheet by adding the back dated 12/21 motion immediately filing the back dated order of Judge Penn on 12/28, the same day I filed for a default judgment. Judge Penn prepared the 12.28 order granting the Motions for enlargement of time. Mr. Dempster mailed the back dated motion of 12/21 to me the week of 12/28 and I received it on December 31, 1987, two weeks later in a envelope without postmark date.

Wherefore affiant prays that the Honorable John Garrett Penn proceed no further in this cause and that another judge be designated in this cause.

DATED: September 27, 1989.

/s/

Connie Reshard

[Other examples of incorrect testimony/statements that were contained in transcripts are cited in the Statement of the Case and included in the district court and court of appeals record as part of the Motion to Disqualify and the Affidavit of Bias and Prejudice.]